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No. 92-410

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK O. BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
GAIL BRODFUEHRER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Congress intended to permit cumulative punishments for the offenses of willfully attempting to evade tax, in violation of 26 U.S.C. 7201, and failure to file a tax return, in violation of 26 U.S.C. 7203.

2. Whether the government's use of evidence regarding petitioner's failure to pay his taxes constructively amended the indictment.

3. Whether the Constitution prohibits a court from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that the defendant committed perjury at trial.

4. Whether the district court properly instructed the jury, under *Cheek* v. *United States*, 111 S. Ct. 604 (1991), that petitioner did not act willfully if he "actually" believed that his conduct was lawful, even if his belief was not objectively reasonable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 965 F.2d 383.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1992. The petition for a writ of certiorari was filed on September 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of willfully attempting to evade taxes, in violation of 26 U.S.C. 7201, and six

counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to three years' imprisonment on the tax-evasion counts and to a consecutive term of three years' imprisonment on the failure-to-file counts, to be followed by three years' supervised release. He was also fined $100,000 and ordered to pay the costs of prosecution. Pet. App. 15-16.

1. The evidence at trial established that from 1982 through 1987, petitioner, a medical doctor, earned in excess of $850,000. Petitioner had three sources of income: he was a salaried physician on the staff of Christ Hospital in Oak Lawn, Illinois; he received honoraria for delivering lectures at the Cook County Graduate School of Medicine; and he maintained a part-time private practice outside the hospital. Petitioner's private patients were billed by John Mock & Associates (JMA) on his behalf. Pet. App. 1-2.

Petitioner provided the relevant information regarding each patient to JMA, and JMA then billed either the patient or the patient's insurance company. The payment checks were remitted to JMA. Prior to January 1982, JMA deposited the checks into petitioner's bank account. Subsequently, however, petitioner directed JMA to send him the checks, unendorsed and undeposited. Beginning in 1982, petitioner eliminated each of his bank accounts, and after 1983, he had his employer, Christ Hospital, stop withholding any federal taxes from his earnings. Pet. App. 2.

From 1982 through 1984, petitioner deposited his paychecks into National Commodity Exchange (NCE), a Colorado-based "warehouse bank," in which

accounts are identified only by an account number. NCE's customers would deposit checks into numbered accounts and, at the customers' direction, NCE would write checks on their behalf. The checks would be issued in the name of NCE or one of its subsidiaries. From 1985 through 1987, petitioner deposited the majority of his income checks into a checking account held by his son, Steven Becker, at the Peotone Bank in Illinois. Pet. App. 2.

Before the 1981 tax year, petitioner had retained an accountant to file his tax returns, but he ceased using the accountant after that year. Although petitioner owed more than $300,000 in taxes on the income he earned during the years covered by the indictment, he did not pay any income taxes or file any tax returns during those years. At trial, petitioner testified that he stopped filing income tax returns and paying income taxes because he had determined that he was not required to do so. Petitioner stated that he believed the money he earned from his medical practice did not constitute gross income. He testified that he had consulted with an attorney, Robert L. Collins, who had confirmed that interpretation of the Internal Revenue Code. Petitioner also said that he had instructed Christ Hospital to stop withholding federal taxes from his paychecks because, after 1983, he considered himself an independent contractor. Petitioner admitted that he had deposited checks at NCE, that he had endorsed checks to his son for deposit in his son's bank account, and that he did not keep any records of his transactions with JMA or NCE. Pet. App. 2-3.

At sentencing, the district court found that petitioner had lied when he testified at trial.[1] The court therefore enhanced his offense level by two levels on the ground that, by committing perjury at trial, he had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. Pet. App. 12-13. The two-level enhancement increased petitioner's offense level from 17 to 19. With a criminal history category of I, petitioner was subject to a sentencing range of 30-37 months' imprisonment on the tax-evasion counts (26 U.S.C. 7201). Pet. C.A. Br. App. 6. The district court sentenced petitioner to three years' imprisonment on those counts, and to a consecutive period of 36 months' imprisonment on the failure-to-file counts (26 U.S.C. 7203).[2] Pet. App. 15-16.

2. The court of appeals affirmed. Pet. App. 1-14. The court rejected petitioner's claim that, with respect to the charges under 26 U.S.C. 7201, the government had constructively amended the indictment by introducing evidence of petitioner's attempted evasion of the payment of taxes. The court noted that the indictment charged petitioner with attempting to evade his taxes, not only by failing to

[1] The trial judge found that petitioner had "perjured himself in a gross, utterly unconvincing and blatant fashion. * * * He is simply not to be believed * * * and his testimony was offered in a manner and form which I think is contemptuous of the ability of both the jury and the Court to determine the truth." Pet. App. 13 (ellipses in original).

[2] The district court determined that the failure-to-file counts were governed by pre-Sentencing Guidelines law. Accordingly, the court found that it had discretion to make the sentence on those counts run consecutively to the sentence on the tax-evasion counts. Pet. C.A. Br. App. 15-16, 18.

file income tax returns, but also by failing to pay taxes, in violation of Section 7201. Moreover, the court noted that "Section 7201 creates only one crime: tax evasion." Pet. App. 4 (internal quotation marks omitted). Accordingly, the court concluded, the government's submission of evidence that petitioner failed to pay his taxes did not constructively amend the indictment. *Ibid.*

The court of appeals also rejected petitioner's claim that the trial court erred in refusing to give his proposed "good faith" instruction. The court of appeals held that the instruction given was "an accurate summary" of this Court's decision in *Cheek* v. *United States*, 111 S. Ct. 604 (1991). Pet. App. 8. The court also noted that petitioner's trial counsel had advised the district court that the instruction that the jury received was "essentially a correct statement of the law." *Ibid.*

Finally, the court of appeals rejected petitioner's challenges to his sentence. First, the court held that the trial judge's finding that petitioner's trial testimony was perjurious was supported by the record. Accordingly, the court held that the two-level upward adjustment to the offense level was not clearly erroneous. Pet. App. 12-13.

Second, the court of appeals held that the trial court did not err in imposing consecutive sentences for petitioner's violations of 26 U.S.C. 7201 and 26 U.S.C. 7203. Pet. App. 13-14. In so holding, the court rejected petitioner's contention that the willful failure to file tax returns, in violation of Section 7203, constituted a lesser included offense of attempted tax evasion, in violation of Section 7201. The court stated

that each of the statutes required proof of a fact that the other does not, and that "there is no indication that Congress did not intend these two statutory provisions to be separate offenses." Pet. App. 14, quoting *United States* v. *Foster*, 789 F.2d 457, 460 (7th Cir.), cert. denied, 479 U.S. 883 (1986).[3]

ARGUMENT

1. Petitioner contends (Pet. 5-11) that the district court's imposition of consecutive sentences under 26 U.S.C. 7201 and 26 U.S.C. 7203 violated his rights under the Double Jeopardy Clause of the Fifth Amendment. He argues that the misdemeanor of failing to file a tax return (Section 7203) is a lesser included offense of the felony of tax evasion (Section 7201) and that the Constitution prohibits cumulative punishment in the same proceeding for a greater and lesser included offense. That contention is incorrect and does not warrant this Court's review.

a. The Double Jeopardy Clause protects against "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States* v. *Halper*, 490 U.S. 435,

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[3] Petitioner also argued, *inter alia*, that evidence was improperly admitted on the tax-evasion counts; that witnesses were permitted to speculate and that the judge erred in failing to give a cautionary instruction on that issue; that the jury was improperly instructed on the Section 7201 charges; that the jury should have been instructed on petitioner's advice-of-counsel defense; that the Speedy Trial Act was violated; and that the government's closing argument was improper. The court of appeals rejected all of those contentions, Pet. App. 3-12, and petitioner does not renew any of them in this Court.

440 (1989). In a single proceeding, the issue of whether cumulative punishment for two statutory violations is compatible with the Double Jeopardy Clause is solely a question of legislative intent. *Id.* at 451 n.10; *Jones* v. *Thomas*, 491 U.S. 376, 381 (1989); *Ohio* v. *Johnson*, 467 U.S. 493, 499 (1984); *Missouri* v. *Hunter*, 459 U.S. 359, 368 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 691-693 (1980). As this Court has explained,

> the question of what punishments are constitutionally permissible [in a single proceeding] is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Albernaz v. *United States*, 450 U.S. at 344; *Missouri* v. *Hunter*, 459 U.S. at 369 (when the legislature intends to authorize cumulative punishment under two statutes, "the prosecutor may seek and the trial court * * * may impose cumulative punishment under such statutes in a single trial").[4]

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[4] Petitioner's reliance (Pet. 6) on *Brown* v. *Ohio*, 432 U.S. 161, 169 (1977), and *Jeffers* v. *United States*, 432 U.S. 137, 150 (1977), is misplaced. *Brown* involved the double jeopardy bar against successive prosecutions for a greater and lesser offense; it did not involve cumulative punishments imposed at a single trial. *Jeffers* did involve an issue of multiple punishment, but the plurality concluded that, because Congress did not intend to allow cumulative punishment for the two statutory violations in question, it was "unnecessary to reach the lesser-included-

Petitioner argues (Pet. 6-8) that Section 7203 should be viewed as a lesser included offense of Section 7201, and that cumulative punishment for the greater and lesser offenses is therefore unconstitutional. The issue of whether Section 7203 is a lesser included offense of Section 7201, however, does not control the disposition of the multiple punishments question. *Garrett* v. *United States*, 471 U.S. 773, 778-779 (1985); *Missouri* v. *Hunter*, 459 U.S. at 368 (upholding cumulative punishment for greater and lesser offenses when "the legislature intended that punishment for violations of the statutes be cumulative"). The "dispositive question" is whether Congress intended to authorize cumulative punishment for the two offenses, and in that inquiry, the "starting point must be the language of the statutes." *Albernaz* v. *United States*, 450 U.S. at 336, 344.

Here, the language of the statutes, 26 U.S.C. 7201 and 26 U.S.C. 7203, and the overall statutory scheme indicate that Congress intended to authorize cumulative punishment for a single course of conduct that violates both provisions. Both provisions state that their penalties are "in addition to other penalties provided by law." 26 U.S.C. 7201, 7203.[5] That lan-

offense issue." 432 U.S. at 155. That analysis does not assist petitioner here.

[5] Section 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony, and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in

guage clearly indicates that penalties for the two offenses may be cumulative. Moreover, in *Spies* v. *United States*, 317 U.S. 492 (1943), this Court described Section 7201 as "the capstone of a system of sanctions which *singly or in combination* were calculated to induce prompt and forthright fulfillment of every duty under the income tax law." *Id.* at 497 (emphasis added). As the Seventh Circuit observed in *United States* v. *Foster*, 789 F.2d 457, 460 (7th Cir.), cert. denied, 479 U.S. 883 (1986), "[t]he structure of the [criminal tax] statute—one broad felony followed by a large number of related misdemeanors—suggests different offenses."

Ordinarily, the examination of whether "each provision requires proof of a fact which the other does not" under *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), "determines whether the crimes are indeed separate and whether cumulative punishments may be imposed." *Ohio* v. *Johnson*, 467 U.S. at 499 n.8; *Albernaz*, 450 U.S. at 337. As this Court has explained, "[t]he assumption underlying the *Blockburger* rule is that Congress ordinarily does not

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the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7203 provides, in relevant part:

> Any person required under this title * * * to make a return * * * who willfully fails to * * * make such return, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 * * * or imprisoned not more than 1 year, or both, together with the costs of prosecution.

intend to punish the same offense under two different statutes." *Ball* v. *United States*, 470 U.S. 856, 861 (1985). The *Blockburger* inquiry, however, "is not controlling when the legislative intent is clear from the face of the statute." *Garrett* v. *United States*, 471 U.S. at 779. Here, it is unnecessary to apply the *Blockburger* test, because Congress's intent to permit cumulative punishment is clear from the face of the relevant provisions.

In any event, Section 7201 and Section 7203 satisfy the *Blockburger* test as applied to the violations at issue in this case, because each provision requires proof of a fact not required by the other. To prove a violation of Section 7201, the government must establish (1) the existence of a tax deficiency, (2) an affirmative act of evasion or attempted evasion of the tax due, and (3) willfulness. To prove a violation of Section 7203, the government must establish (1) the existence of a legal duty to file a tax return; (2) the defendant's failure to file; and (3) willfulness. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). Thus, Section 7201 requires proof of an affirmative act of tax evasion, while Section 7203 does not, and Section 7203 requires failure to file a return, while Section 7201 does not. See *United States* v. *Foster*, 789 F.2d at 460.[6] Thus, under all applicable rules of

[6] Section 7203 can be violated in several ways, and in *Sansone* v. *United States*, 380 U.S. at 351, this Court held that when the violation of Section 7203 is "the failure to pay a tax when due," that violation is a lesser included offense of tax evasion under Section 7201. This case, unlike *Sansone*, does not involve a charge under Section 7203 of failing to pay a tax when due; rather, the indictment charges that petitioner violated a different part of Section 7203, *i.e.*, he "willfully did

statutory construction, cumulative punishment is permissible.

b. Petitioner contends (Pet. 8-9) that the decision in this case conflicts with decisions of other courts of appeals. In *United States* v. *Rosenthal*, 454 F.2d 1252, 1255 (2d Cir.), cert. denied, 406 U.S. 931 (1972), the Second Circuit stated that "on the facts here, the crime defined in § 7203 was a lesser included offense of that defined in § 7201," and it concluded without further analysis that "Congress did not intend two punishments for the same offense." In two Fifth Circuit cases that arose soon after *Rosenthal*, the government conceded that cumulative sentences for violations of Section 7201 and Section 7203 were improper, and the court of appeals agreed. *United States* v. *Newman*, 468 F.2d 791, 793, 796 (1972), cert. denied, 411 U.S. 905 (1973); *United States* v. *Buckley*, 586 F.2d 498, 504 & n.3 (1978), cert. denied, 440 U.S. 982 (1979). And in *United States* v. *Snyder*, 766 F.2d 167, 171 (4th Cir. 1985), the Fourth Circuit followed *Buckley* in vacating cumulative convictions and sentences for failure-to-file and tax-evasion counts covering the same years.[7]

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fail to make the required tax return * * * [i]n violation of Title 26 United States Code, Section 7203." Indict., Counts 2, 4, 6, 8, 10, 12 (emphasis added).

[7] Petitioner also cites (Pet. 9) a variety of other cases that do not involve the issue in this case. In *United States* v. *Kaiser*, 893 F.2d 1300, 1306 (11th Cir. 1990); *United States* v. *Lodwick*, 410 F.2d 1202, 1206 (8th Cir.), cert. denied, 396 U.S. 841 (1969); and *Gaunt* v. *United States*, 184 F.2d 284, 288-290 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951), the courts held that a violation of 26 U.S.C. 7206(1) is a lesser included offense of a violation of Section 7201 and that cumulative punishment

Although we agree with petitioner that those decisions conflict with the Seventh Circuit's approach, the issue of whether cumulative sentences may be imposed for violations of Sections 7201 and 7203 does not require this Court's resolution. First, the rationale of the Second, Fourth, and Fifth Circuits—that when one offense is a lesser included offense of another the two cannot support cumulative punishment—did not survive this Court's decisions in *Garrett* v. *United States*, *supra*; *Ohio* v. *Johnson*, *supra*; *Missouri* v. *Hunter*, *supra*; and *Albernaz* v. *United States*, *supra*.[8] As those cases make clear, the permissibility of cumulative punishment for two statutory violations turns not solely on whether one offense is a lesser included offense of the other, but on an examination of legislative intent. Here, the language and structure of the relevant provisions indicates Congress's intention to permit cumulative punishment. See pp. 8-9, *supra*.[9]

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was therefore impermissible. Accord *United States* v. *Gengo*, 808 F.2d 1, 3-4 n.1 (2d Cir. 1986); *United States* v. *Slutsky*, 487 F.2d 832, 844-846 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974). This case, however, does not involve Section 7206(1).

[8] *Rosenthal*, *Newman*, and *Buckley*, were decided before this Court had issued its decisions explicating the role of legislative intent in multiple punishments analysis. *Snyder* was decided after this Court's cases in the area, but the court failed to cite or apply those decisions.

[9] In the context of deciding whether the jury should be instructed regarding lesser included offenses, several courts have held that the failure to file a tax return (Section 7203) is a lesser included offense of tax evasion (Section 7201). See Pet. 8-9, citing *United States* v. *Doyle*, 956 F.2d 73, 74-75 (5th Cir. 1992); *United States* v. *Cook*, 505 F.2d 659, 664-665 (5th Cir.

Second, the issue in this case does not warrant review because it has quite limited practical significance. Under the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, cumulative punishment for violations of Sections 7201 and 7203 would not result in a greater sentence absent the most exceptional circumstances. Pursuant to the Sentencing Guidelines, when a defendant is charged with multiple counts, "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." Sentencing Guidelines § 3D1.2. Under Sentencing Guidelines § 3D1.2(d), grouping is required of the tax offenses at issue here. See Sentencing Guidelines § 2T1.1 ("Tax Evasion") and § 2T1.2 ("Willful Failure to File Return, Supply Information, or Pay Tax").[10]

1974), cert. denied, 421 U.S. 1000 (1975); *United States* v. *Boone*, 951 F.2d 1526, 1541 (9th Cir. 1991). Those cases are not directly relevant here, because even assuming that a lesser included offense instruction would be appropriate, that issue does not control the question whether cumulative punishment is permissible in a case in which both offenses are charged. Moreover, those cases did not consider whether the failure to file a return is a lesser included offense of tax evasion under the "elements" test that this Court recently adopted in *Schmuck* v. *United States*, 489 U.S. 705, 715-722 (1989).

[10] Petitioner's case is highly unusual because the felony tax-evasion counts were covered by the Sentencing Guidelines, but the misdemeanor failure-to-file counts (which were completed earlier) were not. Accordingly, the district court had discretion to make the sentences for the felony and misdemeanor counts consecutive. See note 2, *supra*. The cumulative punishment issue presented in that context is unlikely to recur. In a case governed exclusively by the Guidelines, as most future cases will be, the option of consecutive sentences will not be available.

Once related tax counts have been grouped, the sentence is based on the total tax loss, not on the number of statutory violations. Thus, under the Guidelines, if a defendant is convicted of one count of tax evasion, in violation of Section 7201, and one count of willful failure to file a return, in violation of Section 7203, those two counts would be grouped together, and there would be no incremental punishment for each "grouped" count. The offense level would instead be established by determining the amount of the tax loss and then consulting Sentencing Guidelines § 2T.14 ("Tax Table"). Only in a rare case—where, for example, the defendant has a criminal history category of I and the tax loss exceeds $80,000,000, or the defendant has a criminal history category of II or III and the tax loss exceeds $40,000,000—will the sentencing court be required to consider a term of imprisonment longer than five years.[11] Tax losses of that magnitude are infrequent. Accordingly, for those offenses occurring after November 1, 1987, it is extremely unlikely that convictions under both Section 7201 and Section 7203 would result in any difference in the length of the defendant's sentence.[12]

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[11] Section 7201 authorizes a maximum term of imprisonment for a single count of five years. 26 U.S.C. 7201. Thus, a failure-to-file misdemeanor will not be relevant to the sentence absent the extreme degree of tax loss described in the text.

[12] Under *Ball* v. *United States*, 470 U.S. 856, 864-865 (1985), when Congress does not intend a defendant to be punished under two statutes, a trial court must enter judgment on only one of the statutory offenses. Thus, if petitioner's position were accepted, it would require courts to enter judgments of conviction on the Section 7201 count alone, rather than on both

2. Petitioner contends (Pet. 12-19) that the government's introduction of evidence of his evasion of payment of taxes, in violation of 26 U.S.C. 7201, constructively amended the indictment, in violation of his rights under the Fifth and Sixth Amendments. The court of appeals correctly rejected that claim, Pet. App. 4, and its ruling does not conflict with any decision of this Court or any other court of appeals.

A constructive amendment of an indictment occurs if the indictment's charging terms are altered "by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986); see also *Stirone* v. *United States*, 361 U.S. 212, 218-219 (1960); *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988); *United States* v. *Dunn*, 758 F.2d 30, 35 (1st Cir. 1985); *United States* v. *Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984); *United States* v. *Davis*, 679 F.2d 845, 851 (11th Cir. 1982), cert. denied, 459 U.S. 1207 (1983). In this case, both the evidence and the jury instructions conformed to, rather than modified, the charges in the indictment.

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the Section 7201 and Section 7203 counts. We are unaware, however, of any collateral consequences to a defendant of having *both* a felony and misdemeanor tax conviction on his record, rather than having just the felony tax conviction. The misdemeanor would appear to add little or nothing to the impact of the sentence. Thus, even if petitioner were correct on the cumulative punishment issue, it has insufficient practical future consequence to warrant this Court's review.

Counts 1, 3, 5, 7, 9, and 11 charged petitioner with attempted tax evasion for 1982 through 1987, in violation of 26 U.S.C. 7201. Section 7201 imposes criminal penalties on "[a]ny person who willfully *attempts in any manner to evade or defeat any tax imposed by this title* or the payment thereof." 26 U.S.C. 7201 (emphasis added). The pertinent language of the tax evasion counts in this case tracked the italicized portion of the statute by charging that petitioner "willfully and knowingly did attempt to evade and defeat said income tax due and owing to the United States." Each count then identified the manner in which petitioner evaded the tax: "by failing to make such income tax return"; "by failing to pay said income tax"; "[b]y causing his employer to stop withholding federal income tax"; and "[b]y endorsing his earnings checks to other individuals and institutions."

Petitioner acknowledges (Pet. 16-17) that the indictment charged him with attempted evasion of assessment of his taxes. He claims, however, that by introducing evidence regarding his failure to pay his taxes the government constructively amended the indictment to include a charge of attempted evasion of payment. The introduction of evidence that defendant failed to pay his taxes, however, was consistent with the allegations of the indictment: the indictment alleged that failure to pay taxes was one of several means by which defendant attempted to evade his taxes.[13]

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[13] Petitioner's suggestion (Pet. 16) that he would have altered his defense if he had been charged with evasion of payment is without force. The indictment gave petitioner

Petitioner's claim that the government amended the indictment by introducing evidence regarding the attempted evasion of payment of taxes rests on the erroneous premise that evasion of assessment and evasion of payment cannot be proved by the same affirmative acts. Although *Spies* v. *United States*, 317 U.S. at 498-499, construed Section 7201 to require proof of an affirmative act of evasion, it did not require that the affirmative act exclusively support *either* attempted evasion of assessment *or* attempted evasion of payment. Nor do any of the cases cited by petitioner suggest such a requirement. Rather, both the First and Fifth Circuits have recently held that the same conduct can constitute both an attempt to evade payment and an attempt to evade assessment. *United States* v. *Waldeck*, 909 F.2d 555, 560 (1st Cir. 1990) (filing false W-4 forms "may be used as evidence of either evasion of assessment of tax or evasion of payment of tax or both"); *United States* v. *Masat*, 896 F.2d 88, 91 (5th Cir. 1990) (assigning income and property to nominees and filing false W-4 forms "are acts constituting both evasion of payment and evasion of assessment"). Thus, the evidence introduced by the government was designed to show, and did show, that petitioner was guilty of the attempted evasion offense charged in the indictment.

The jury instructions were also consistent with the theory of the indictment that petitioner attempted

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notice that his failure to pay taxes was at issue. Moreover, petitioner's claim of prejudice ignores his admission that he had stopped filing returns and paying income taxes; his defense was based on lack of willfulness because of his supposed belief that wages were not income.

to evade and defeat taxes; they did not give the jury the option of convicting petitioner of attempted evasion of payment. The district court's description of Section 7201 referred only to an attempt "in any manner to evade or defeat any tax imposed by this title," without any reference to evasion of payment (Instruction 9), and the court's recitation of the elements of the offense made no reference to evasion of payment (Instruction 3). Accordingly, petitioner's claim that he was tried on a theory that departed from the indictment is without merit.[14]

3. Petitioner contends (Pet. 19-25) that Sentencing Guidelines § 3C1.1, which provides for a two-level increase in the base offense level when the defendant obstructs or impedes justice, cannot constitutionally be applied to a defendant who testifies falsely at trial. That issue is currently before the Court in *United States* v. *Dunnigan*, No. 91-1300 (to be argued Dec. 2, 1992). Accordingly, the Court should hold the petition as to that issue and dispose of it in light of the decision in *Dunnigan*.

4. Petitioner asserts (Pet. 25-28) that the district court's instruction with respect to whether petitioner had a good-faith belief in the lawfulness of his conduct was inconsistent with *Cheek* v. *United*

[14] Because petitioner was charged with and convicted of only evasion of assessment of taxes, this case does not present the question whether Section 7201 defines one offense or two separate and distinct offenses. See Pet. 12-15. Nor, as petitioner acknowledges, does it present the question whether Section 7201 authorizes cumulative punishments for evasion of assessment and evasion of payment of a single year's tax. See Pet. 18-19.

States, 111 S. Ct. 604 (1991). The court of appeals correctly rejected that contention, and it warrants no review here.[15]

In *Cheek*, the Court held that it is error to instruct the jury that a defendant's good-faith belief must be objectively reasonable to negate willfulness. 111 S. Ct. at 611. The district court gave no such instruction here. It instructed (Pet. App. 8):

> A defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. Therefore, if the defendant actually believed that what he was doing was in accord with the tax statutes, he cannot be said to have had the criminal intent to willfully evade or defeat taxes or to willfully fail to file tax returns. This is so even if defendant's belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith.

That instruction informed the jury that it should apply a subjective standard, and it neither stated nor implied the limitation rejected in *Cheek* that a good-faith belief must be objectively reasonable in order to negate willfulness. To the contrary, the jury was explicitly instructed that "even if [petitioner's] belief was not objectively reasonable," petitioner could not be said to have possessed the requisite criminal

[15] As the court of appeals noted, petitioner conceded at trial that the district court's instruction "is essentially a correct statement of the law." Pet. App. 8.

intent "as long as he held the belief in good faith." Pet. App. 8.

Petitioner suggests that the court's use of the phrases "actually believed" and "actually reasonable" represented an attempt "to retain the essence of the Seventh Circuit's erroneous 'objectively reasonable' standard." Pet. 26. The phrase "actually believed," however, directed the jury to focus its inquiry on petitioner's actual state of mind, and the sentence in which the phrase "actually reasonable" appeared made it abundantly clear that reasonableness was simply a factor that the jury could consider in ascertaining petitioner's actual state of mind.[16]

Contrary to petitioner's contention (Pet. 27), the decision of the court of appeals does not conflict with

[16] This Court suggested in *Cheek* that such consideration is appropriate. See 111 S. Ct. at 611-612 ("Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws."). Accord *United States* v. *Barnett*, 945 F.2d 1296, 1299 (5th Cir. 1991) (upholding instruction allowing jury to consider the grounds on which a defendant based his claim of good faith in determining whether he actually acted in good faith), cert. denied, 112 S. Ct. 1487 (1992); *United States* v. *Collins*, 920 F.2d 619, 622-623 (10th Cir. 1990) (upholding instruction that "if you regard [defendant's] belief as being highly unreasonable, you may consider this along with all other evidence on the question of whether his belief was indeed genuine or merely feigned"), cert. denied, 111 S. Ct. 2022 (1991); *United States* v. *Turano*, 802 F.2d 10, 11 (1st Cir. 1986) ("The jury * * * must use whatever evidence they can to determine what [defendant] believed. The more unreasonable the defendant's alleged belief that he did not have to file a tax return, the less likely he, in fact, held that belief.").

United States v. *Powell*, 955 F.2d 1206 (9th Cir. 1992). In *Powell*, the court specifically recognized that the jury may consider the "reasonableness" of a defendant's alleged beliefs in determining whether he actually held them. *Id.* at 1212. The *Powell* court held, however, that the instruction in that case was deficient because "it did not make clear that the defendant must demonstrate only that a subjective good faith belief is held and not that the belief must also be found to be objectively reasonable."[17] *Ibid.* *Powell* is inapposite here, as the instruction given at petitioner's trial expressly stated that a good-faith belief would negate willfulness "even if defendant's belief was not objectively reasonable as long as he held the belief in good faith." Pet. App. 8.

CONCLUSION

The petition for a writ of certiorari should be held as to the third question presented and disposed of in

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[17] The *Powell* instruction stated that "if a person acts without reasonable grounds for belief that his or her conduct is lawful, it is for you to decide whether the defendants acted in good faith." 955 F.2d at 1211. In our view, *Powell*'s criticism of that instruction is unwarranted; the instruction is a standard jury instruction, see 2 E. Devitt, C. Blackmar & K. O'Malley, *Federal Jury Practice and Instructions* § 56.26, at 1044 (4th ed. 1990), and clearly directs the jury to acquit the defendants if the jury concludes that the defendants genuinely believed that they were not required to file returns—regardless of whether that belief was reasonable. The instruction has been upheld by most of the courts of appeals that have addressed the issue: See *United States* v. *Whiteside*, 810 F.2d 1306, 1311 (5th Cir. 1987); *United States* v. *Payne*, 800 F.2d 227, 229 (10th Cir. 1986); *United States* v. *Aitken*, 755 F.2d 188, 190 (1st Cir. 1985). That instruction, however, is not at issue in this case.

light of *United States* v. *Dunnigan*, No. 91-1300 (to be argued Dec. 2, 1992). As to the other questions presented, the petition should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
GAIL BRODFUEHRER
Attorneys

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